

1 **PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY**2 Name Orozco, David  
(Last) (First) (Initial)

3 Prisoner Number CDC# T25768

4 Institutional Address Sierra Conservation Center, 5150 O'Brynes  
5 Ferry Road; Jamestown, CA 95327FEB 25 2008  
RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA6 **UNITED STATES DISTRICT COURT**  
7 **NORTHERN DISTRICT OF CALIFORNIA**

8 DAVID OROZCO

9 (Enter the full name of plaintiff in this action.)

10 vs.  
IVAN CLAY, Warden, Sierra

11 Conservation Center;

12 JERRY BROWN, et. als., Attorney

13 General, State of California.  
(Enter the full name of respondent(s) or jailor in this action)

CV 08 1124

Case No. \_\_\_\_\_

(To be provided by the clerk of court)

PETITION FOR A WRIT  
OF HABEAS CORPUS

E-filing

CRB  
(PR)16 **Read Comments Carefully Before Filing In**17 **When and Where to File**18 You should file in the Northern District if you were convicted and sentenced in one of these  
19 counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa,  
20 San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma. You should also file in  
21 this district if you are challenging the manner in which your sentence is being executed, such as loss of  
22 good time credits, and you are confined in one of these counties. Habeas L.R. 2254-3(a).23 If you are challenging your conviction or sentence and you were not convicted and sentenced in  
24 one of the above-named fifteen counties, your petition will likely be transferred to the United States  
25 District Court for the district in which the state court that convicted and sentenced you is located. If  
26 you are challenging the execution of your sentence and you are not in prison in one of these counties,  
27 your petition will likely be transferred to the district court for the district that includes the institution  
28 where you are confined. Habeas L.R. 2254-3(b).

1 Who to Name as Respondent

2 You must name the person in whose actual custody you are. This usually means the Warden or  
 3 jailor. Do not name the State of California, a city, a county or the superior court of the county in which  
 4 you are imprisoned or by whom you were convicted and sentenced. These are not proper  
 5 respondents.

6 If you are not presently in custody pursuant to the state judgment against which you seek relief  
 7 but may be subject to such custody in the future (e.g., detainees), you must name the person in whose  
 8 custody you are now and the Attorney General of the state in which the judgment you seek to attack  
 9 was entered.

10 A. INFORMATION ABOUT YOUR CONVICTION AND SENTENCE

11 1. What sentence are you challenging in this petition?

12 (a) Name and location of court that imposed sentence (for example; Alameda  
 13 County Superior Court, Oakland):

14 Alameda County Superior Court, Oakland

15 Court Location

16 (b) Case number, if known H29336

17 (c) Date and terms of sentence 08/16/01 (12 years)

18 (d) Are you now in custody serving this term? (Custody means being in jail, on  
 19 parole or probation, etc.) Yes x No \_\_\_\_\_

20 Where?

21 Name of Institution: Sierra Conservation Center

22 Address: 5150 O'Byrnes Ferry Road, Jamestown, CA

95327

23 2. For what crime were you given this sentence? (If your petition challenges a sentence for  
 24 more than one crime, list each crime separately using Penal Code numbers if known. If you are  
 25 challenging more than one sentence, you should file a different petition for each sentence.)

26 Voluntary manslaughter §190(a); use of deadly weapon §12022(b)

27 \_\_\_\_\_  
 28 \_\_\_\_\_

1                   3. Did you have any of the following?

2                   Arraignment:                   Yes            No \_\_\_\_\_

3                   Preliminary Hearing:           Yes            No \_\_\_\_\_

4                   Motion to Suppress:           Yes            No \_\_\_\_\_

5                   4. How did you plead?

6                   Guilty    Not Guilty \_\_\_\_\_   Nolo Contendere \_\_\_\_\_

7                   Any other plea (specify) \_\_\_\_\_

8                   5. If you went to trial, what kind of trial did you have?

9                   Jury \_\_\_\_\_   Judge alone \_\_\_\_\_   Judge alone on a transcript \_\_\_\_\_

10                  6. Did you testify at your trial?                   Yes \_\_\_\_\_           No \_\_\_\_\_

11                  7. Did you have an attorney at the following proceedings:

12                  (a)           Arraignment                   Yes            No \_\_\_\_\_

13                  (b)           Preliminary hearing           Yes            No \_\_\_\_\_

14                  (c)           Time of plea                   Yes            No \_\_\_\_\_

15                  (d)           Trial                           Yes N/A                   No \_\_\_\_\_

16                  (e)           Sentencing                   Yes            No \_\_\_\_\_

17                  (f)           Appeal                           Yes \_\_\_\_\_           No

18                  (g)           Other post-conviction proceeding           Yes \_\_\_\_\_           No

19                  8. Did you appeal your conviction?                   Yes \_\_\_\_\_           No

20                  (a)           If you did, to what court(s) did you appeal?

21                  Court of Appeal                           Yes \_\_\_\_\_           No \_\_\_\_\_

22                  Year: N/A                   Result: N/A \_\_\_\_\_

23                  Supreme Court of California                   Yes \_\_\_\_\_           No \_\_\_\_\_

24                  Year: N/A                   Result: N/A \_\_\_\_\_

25                  Any other court                           Yes \_\_\_\_\_           No \_\_\_\_\_

26                  Year: N/A                   Result: N/A \_\_\_\_\_

27                  (b)           If you appealed, were the grounds the same as those that you are raising in this

1 petition? Yes \_\_\_\_\_ No x

2 (c) Was there an opinion? Yes \_\_\_\_\_ No x

3 (d) Did you seek permission to file a late appeal under Rule 31(a)?

4 Yes \_\_\_\_\_ No x

5 If you did, give the name of the court and the result:

6 N/A

7 N/A

8 9. Other than appeals, have you previously filed any petitions, applications or motions with respect to  
9 this conviction in any court, state or federal? Yes x No \_\_\_\_\_

10 [Note: If you previously filed a petition for a writ of habeas corpus in federal court that  
11 challenged the same conviction you are challenging now and if that petition was denied or dismissed  
12 with prejudice, you must first file a motion in the United States Court of Appeals for the Ninth Circuit  
13 for an order authorizing the district court to consider this petition. You may not file a second or  
14 subsequent federal habeas petition without first obtaining such an order from the Ninth Circuit. 28  
15 U.S.C. §§ 2244(b).]

16 (a) If you sought relief in any proceeding other than an appeal, answer the following  
17 questions for each proceeding. Attach extra paper if you need more space.

18 I. Name of Court: Alameda County Superior Court

19 Type of Proceeding: Petition for Writ of Habeas Corpus

20 Grounds raised (Be brief but specific):

21 a. Due Process Violations

22 b. \_\_\_\_\_

23 c. \_\_\_\_\_

24 d. \_\_\_\_\_

25 Result: Petition was denied Date of Result: July 2007

26 II. Name of Court: Supreme Court of California

27 Type of Proceeding: Petition for Writ of Habeas Corpus

28 Grounds raised (Be brief but specific):

1 a. Due Process Violation \_\_\_\_\_

2 b. \_\_\_\_\_

3 c. \_\_\_\_\_

4 d. \_\_\_\_\_

5 Result: Petition was denied Date of Result: Dec. 2007

6 III. Name of Court: \_\_\_\_\_

7 Type of Proceeding: \_\_\_\_\_

8 Grounds raised (Be brief but specific):

9 a. \_\_\_\_\_

10 b. \_\_\_\_\_

11 c. \_\_\_\_\_

12 d. \_\_\_\_\_

13 Result: \_\_\_\_\_ Date of Result: \_\_\_\_\_

14 IV. Name of Court: \_\_\_\_\_

15 Type of Proceeding: \_\_\_\_\_

16 Grounds raised (Be brief but specific):

17 a. \_\_\_\_\_

18 b. \_\_\_\_\_

19 c. \_\_\_\_\_

20 d. \_\_\_\_\_

21 Result: \_\_\_\_\_ Date of Result: \_\_\_\_\_

22 (b) Is any petition, appeal or other post-conviction proceeding now pending in any court?

23 Yes \_\_\_\_\_ No x

24 Name and location of court: \_\_\_\_\_

25 B. GROUNDS FOR RELIEF

26 State briefly every reason that you believe you are being confined unlawfully. Give facts to  
27 support each claim. For example, what legal right or privilege were you denied? What happened?  
28 Who made the error? Avoid legal arguments with numerous case citations. Attach extra paper if you

1 need more space. Answer the same questions for each claim.

2 [Note: You must present ALL your claims in your first federal habeas petition. Subsequent  
3 petitions may be dismissed without review on the merits. 28 U.S.C. §§ 2244(b); McCleskey v. Zant,  
4 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed. 2d 517 (1991).]

5 Claim One: See Petitioner's "Points of Authority and Memorandum  
6 of Law" that is incorporated by referenced.

7 Supporting Facts: I d.

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Claim Two:

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Supporting Facts:

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Claim Three:

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Supporting Facts:

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If any of these grounds was not previously presented to any other court, state briefly which  
24 grounds were not presented and why:

25

N / A

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1 List, by name and citation only, any cases that you think are close factually to yours so that they  
2 are an example of the error you believe occurred in your case. Do not discuss the holding or reasoning  
3 of these cases:

4 I d. \_\_\_\_\_

5 \_\_\_\_\_

6 \_\_\_\_\_

7 Do you have an attorney for this petition?

Yes \_\_\_\_\_ No x \_\_\_\_\_

8 If you do, give the name and address of your attorney:

9 N / A \_\_\_\_\_

10 WHEREFORE, petitioner prays that the Court grant petitioner relief to which s/he may be entitled in  
11 this proceeding. I verify under penalty of perjury that the foregoing is true and correct.

12

13 Executed on 2/6/08

14 Date

David Oyoco

15 Signature of Petitioner

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20 (Rev. 6/02)

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### Table of Citations

### U.S. Cases:

<i>Apprendi v. New Jersey</i> , 530 U.S. 466(2000) .....	3
<i>Jones v. U.S.</i> , 526 U.S. 227(1999) .....	3
<i>Ring v. Arizona</i> , 536 U.S. 584(2004) .....	3
<i>United States v. Booker</i> , 543 U.S. 220(2005) .....	4
<i>Blakely v. Washington</i> , 542 U.S. 296(2004) .....	4

## U.S. Constitution

Sixth Amendment to the United States Constitution .....	3
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California Penal Code Sections

Section 192(b) .....	3
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**State Judicial Council Rules:**

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## STATEMENT OF THE CASE

On May 21, 2001, "Petitioner" David Orozco tendered a guilty plea to one(1) count of voluntary manslaughter in violation of California Penal Code (hereinafter "Penal Code") Section 192(a) and similarly admitted to the use of a deadly weapon in the manslaughter offense in violation of Penal Code Section 12022(b). In exchange for Petitioner's plea of guilty and admission of weapon usage, Petitioner was sentenced to 11 years imprisonment for the voluntary manslaughter offense and to a consecutive one-year term for the deadly weapon offense. No additional facts were either alleged by the prosecution or admitted by the Petitioner.

### GROUND FOR RELIEF

PETITIONER'S GUILTY PLEA TO VOLUNTARY MANSLAUGHTER EXPOSED PETITIONER TO ONLY A SIX-YEAR SENTENCE OF IMPRISONMENT. THE TRIAL COURT'S IMPOSITION OF AN ELEVEN-YEAR SENTENCE, ABSENT PETITIONER'S ADMISSION OF ANY AGGRAVATING FACTS OR VOLUNTARY WAIVER OF JURY TRIAL RIGHTS THEREOF, WAS VIOLATIVE OF PETITIONER'S DUE PROCESS RIGHTS AS SECURED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The United States Supreme Court announced in *Apprendi*<sup>1</sup> that, under the Sixth Amendment to the U.S. Constitution, any fact that exposes a defendant to a sentence in excess of the relevant statutory maximum must be found by a jury, not a judge, and established beyond a reasonable doubt. The Court has applied this tenet to facts subjecting a defendant to the death penalty (*Ring*)<sup>2</sup>, to facts permitting a sentence in excess of the standard range

<sup>1</sup> *Apprendi v. New Jersey*, 530 U.S. 466(2000). The Court's rule instructs that the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant.

<sup>2</sup> *Ring v. Arizona*, 536 U.S. 584 (2002)

1 (Blakely)<sup>3</sup>, and to facts triggering a sentence range elevation under Federal  
2 Sentencing Guidelines (Booker).<sup>4</sup>

3 Petitioner in the instant matter had pled guilty to one(1) count of  
4 voluntary manslaughter. Under the California Determinate Sentencing Law  
5 ("DSL") that offense is punishable by imprisonment for a lower term sentence  
6 of three(3) years, a middle term sentence of six(6) years, or an upper term  
7 sentence of eleven(11) years. Moreover, Penal Code Section 1170(b) severely  
8 restricts the trial judge's discretion. In relevant part, that is, §1170  
9 provides "[t]he court shall order the imposition of the middle term, unless  
10 there are circumstances in aggravation or mitigation of the crime." Section  
11 1170(b) further clarifies that circumstances in aggravation or mitigation are  
12 to be determined by the court after consideration of several items: the trial  
13 record; the probation officer's report, statements in aggravation or  
14 mitigation submitted by the parties, the victim, or the victim's family. And  
15 although in the instant matter there was no trial, the court did consider the  
16 probation report [see Proceeding of August 3, 2001, at p. 1] and testimony of  
17 the victim's family members [id. at 3, 4, and 5] to give the appearance of  
18 conforming to §1170. The drawback, however, is that Rules 4.420(a), et seq.,  
19 of the State Judicial Council defines circumstances in aggravation as facts.  
20 And facts aggravating an offense, these Rules likewise instruct, shall be  
21 established by a preponderance of the evidence. *Accord*, Rule 4.420(b). In  
22 sum, California's DSL and the rules governing its application, direct the  
23 sentencing court to start with the middle term, and to move from that term  
24 only when the court itself finds and places on the record *facts*—whether  
25 related to the offense or the offender—beyond the elements of the charged

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<sup>3</sup> *Blakely v. Washington*, 542 U.S. 296(2004).

<sup>4</sup> *United States v. Booker*, 543 U.S. 220(2005).

1 offense. Consequently, an upper term sentence may be imposed only when the  
2 trial judge makes the requisite finding of aggravation. This procedure of  
3 permitting a judge to determine facts of aggravation based on a mere  
4 preponderance of evidence that was not admitted by the Petitioner runs afoul  
5 of both *Apprendi* and *Cunningham* and is violative of Petitioner's due process  
rights.

6 **WHEREFORE**, the Petitioner David Orozco prays that the writ of habeas  
7 corpus issue, that counsel be appointed to brief the subject matter more  
8 fully, and that this Honorable Court **GRANT** any and all other relief that  
9 appears proper and just and the nature of this case may meet.

10  
11 Respectfully submitted,  
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13  
14 David Orozco, pro se  
15 *David Orozco*  
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A vertical strip of airmail envelope. At the top are two postage stamps: the left one is a black silhouette of a lighthouse with 'USA FIRST CLASS FOREVER' and the right one is a black silhouette of a bell with 'USA FIRST CLASS FOREVER'. Below the stamps is a wavy, textured pattern. Four circular postmarks are arranged vertically: the top one is 'STATION CAY 95213 01 FEB 2003', the second from the top is 'STATION CAY 95213 01 FEB 2003', the third from the top is 'STATION CAY 95213 01 FEB 2003', and the bottom one is 'STATION CAY 95213 01 FEB 2003'. The text 'State Correctional Facility Generated Mail' is printed vertically along the right edge of the envelope.

CLERK OF COURT  
U.S. DISTRICT COURT, NORTHERN DISTRICT  
450 GOLDEN GATE AVE. 16<sup>TH</sup> FL.  
SAN FRANCISCO, CA. 94102

January 20, 2008

Clerk of Court  
U.S. district Court, Northern District  
450 Golden Gate, AVE., 16th FL.  
San Francisco, CA 94102

CRB

CV 08 1124

Dear Clerk of Court:

Enclosed is an original of my Petition of Writ of Habeas Corpus and an Application to Proceed Informa Pauperis on that cause.

Please bring these documents to the court's attention at your next convenience. Thank you in advance.

Very truly yours.

David Orozco

David Orozco, #T25768  
Sierra Conservation Center  
5150 O'Brynes Ferry Road  
Jamestown, CA 95327

E-filing

P.S. I also enclosing an additional copy of my Petition of Writ of Habeas Corpus so that it may be stamped as "filed" and returned to me for my records. Thanks.